United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Thursday, April 23, 1970

WILBUR K. MILLER

BRIEF FOR APPELLANT

SUMMARY

MT RR #1

UNITED STATES COURT OF APPEALS
For the District of Columbia

337

No. 23,058

UNITED STATES OF AMERICA

v.

HARRY R. THOMAS, JR.

Appellant

Appeal from Judgment of the United States District Court for the District of Columbia

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TABLE OF AUTHORITIES

* indicates cases chiefly relied upon by Appellant

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v.

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Appellant

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Brief for Appellant

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

* This case has not previously been before this Court.

References to Rulings - Opinion of trial court of motion to suppress in court identification - T 33-36

Objection to instructions to jury of trial court found in pages 30-47 of transcript of March 3, 1969

1. DID THE FAILURE OF THE POLICE TO PRESERVE THE PHOTOGRAPHS OR A RECORD OF THE PHOTOGRAPHS, USED IN THE PRE-TRIAL IDENTIFICATION BY ALL OF THE EYE WITNESSES, EFFECTIVELY DENY THE DEFENDANT'S RIGHT TO DETERMINE IF THE PHOTOGRAPHIC IDENTIFICATION PROCEDURE WAS SO IMPERMISSABLY SUGGESTIVE AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

2. DID THE FAILURE OF THE GOVERNMENT TO PROVIDE COUNSEL FOR THE DEFENDANT AT THE TIME THE PHOTOGRAPHS WERE SHOWN TO THE WITNESSES VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL, AT A TIME WHEN DEFENDANT WAS IN CUSTODY.

3. DID THE FAILURE OF THE POLICE TO PRESERVE THE PHOTOGRAPHS, OR A RECORD OF THE PHOTOGRAPHS, USED IN THE PRE-TRIAL IDENTIFICATION BY ALL OF THE EYE WITNESSES, AND THE GOVERNMENTS SUBSEQUENT FAILURE TO INTRODUCE THE PHOTOGRAPHS IN EVIDENCE, CREATE A PRESUMPTION THAT THE PHOTOGRAPHS, IF THEY HAD BEEN INTRODUCED, WOULD HAVE REVEALED THAT THEY WERE UNDULY SUGGESTIVE, AND SHOULD THAT PRESUMPTION HAVE BEEN CONSIDERED BY THE COURT AND JURY.

4. THAT THIS COURT SHOULD CONSIDER THE ISSUES RAISED ON APPEAL BY THE APPELLANT NOTWITHSTANDING THE TRIAL COUNSEL FAILURE TO PRESERVE SAID ISSUES AT TRIAL.

STATEMENT OF CASE

The defendant below, Harry R. Thomas, Jr. was convicted upon each of three counts of an indictment, the first of which charged the crime of robbery under the District of Columbia Code Title 22, Sec. 2901 (1967 Ed.) and two separate counts of assault with a dangerous

weapon, District of Columbia Code Title 22, Sec. 501 (1967 Ed.), alleged to have risen out of the robbery holdup of the Brookland Liquor Store, 3000 12th Street N. E., Washington, D. C. on the evening of June 1, 1968 at about 6:00 p.m. (T. B. 20)

The evidence produced by the Government tended to show that at the time and place of the robbery the store owner, Mr. Irving Pincus and a patron by the name of Thurman Williams along with others not specifically identified, were in Mr. Pincus's Liquor Store (T 10-T 81)

Mr. Williams testified that at the date and time in question he was a customer in the store of Mr. Pincus and was on his way out of the store when he was told to get back by the defendant; that the defendant had a revolver at the time; that the defendant was in the store approximately two or three minutes; that there was good lighting; that the defendant was close enough to him that the revolver was touching him. (T 10) The Liquor Store was robbed by the taking of money from the cash register in the presence of Mr. Pincus and Mr. Williams.

Approximately one hour after the alleged robbery the defendant was arrested by a member of the Metropolitan Police Department as he was seen leaving a motor vehicle near the location of the Liquor Store and in response to a Police lookout posted for the particular automobile. (T. B. 120)

Mr. Williams testified at a pre-trial identification hearing that he was shown three or four photographs on the evening of the robbery by Detective Charles W. Robinson, the officer in charge of the case. (T 12) He stated that the officer did not point in any way to

any particular photograph nor did he mention or state that one of the photographs depicted the man who committed the crime. (T 13) However, Mr. Williams had previously testified on July 18, 1968 at a preliminary hearing in the United States Commissioners Office that on the evening of the robbery, June 1, 1968, he was shown two or three photographs by Detective Robinson (P.28-29). In addition, Mr. Williams stated that he saw the defendant twice in the United States Commissioners Office and that the room was crowded on each occasion and no one pointed this defendant out to him at these times. (T14-16) Mr. Williams was specifically asked by the Trial Court whether or not he would be able to identify the defendant had he not seen the photographs. The witness responded in the affirmative. (T 31) The witness further testified that he could not remember whether or not any of the men in the photograph had goatees or other hair around their chin and face. (Such as the defendant) (T 80)

Mr. Pincus testified at the pre-trial hearing that he could not remember whether or not he was shown any photographs of the suspects at the time following the robbery. (T 81) He testified, however, that he is certain he did not identify anyone from the photographs. (T 81 - 82)

Officer Charles W. Robinson of the Intelligence Division of the Metropolitan Police Department testified at the pre-trial identification hearing that he investigated the robbery of the Brookland Liquor Store. He further stated that he brought photographs to Mr. Pincus and Mr. Williams on June 3, 1968. (This would

have been two days following the robbery and the defendant's near immediate apprehension) He was not sure of the exact number of photographs that were shown to Mr. Pincus and Mr. Williams, but he was sure that there were more than ten but less than twenty; and that these photographs were color Polaroid photographs. Officer Robinson stated that he did not make any direct statement. He just showed them to these individuals and said "Can you make an identification of any one from this group?" (T 42-44). The officer had no independent recollection that Mr. Williams made an identification from any one of the group. (T 43) The officer stated that Mr. Pincus had stated to him that one of the photographs looked like the man. (T 47). The officer stated that he had selected the group of photographs for skin color, general age group, and as close as possible to size. (T 47) The defendant had a goatee at the time. (T 62) but the officer does not recall whether or not the <u>other</u> pictures of the group contained gentlemen who had goatees. The officer stated he could not reproduce the stack of photographs used at the identification showing, which was held subsequent to the arrest of the defendant for the commission of this crime. He stated "It was a group I had taken from the photographs kept on file at the Robbery Squad. I replaced those back." (T 47)

The officer was further asked "Now do you have a record of the photographs that were used in the spread? A. No, I don't Sir." (T 62)

At no time does the record reflect that Counsel representing or acting on behalf of the defendant was present at the time the

photographs were shown to either of the eye witnesses, notwithstanding the fact that the defendant was taken in to custody in connection with this particular robbery prior to the exhibition of these photographs to the two eye witnesses.

The defendant took the stand in his own behalf and testified that he was not at or near the scene of the crime at the time of the robbery and did not commit the crimes. (T.B. 165)

The defendant produced a witness to substantiate his defense that he was shooting dice in an alley at the time of the robbery and assaults, and thus could not have been involved. (T. B. 149)

The Court has jurisdiction pursuant to Title 28, Sec. 1291, United States Code.

ARGUMENT

I

DID THE FAILURE OF THE POLICE TO PRESERVE THE PHOTOGRAPHS, OR A RECORD OF THE PHOTOGRAPHS, USED IN THE PRE-TRIAL IDENTIFICATION BY ALL OF THE EYE WITNESSES, EFFECTIVELY DENY THE DEFENDANT'S RIGHT TO DETERMINE IF THE PHOTOGRAPHIC IDENTIFICATION PROCEDURE WAS SO IMPERMISSABLY SUGGESTIVE AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION

The United States Supreme Court, as well as numerous lower Courts, has long recognized the inherent hazards and dangers to defendants by the use of pre-trial photographic identification techniques. SIMMONS v. UNITED STATES, 390 US 377,88 S. Ct. 967 (1968) In the SIMMONS case, the Supreme Court stated the following with respect to pre-trial photographic identification:

> "It must be recognized that improper employment of photographs by Police may sometime cause witnesses to err in identifying criminals. The witness may have obtained only a brief glimpse of a criminal or may have seen him under poor conditions. Even if the Police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the Police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the Police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen reducing the trustworthiness of subsequent lineup or courtroom identifications. (Emphasis added).....
> We hold that each case must be considered on its own facts and that convictions based on eye witness identification at trial following a pre-trial identification by photographs will be set aside on that ground only if

> the photographic identification procesure was so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification ..... the danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross examination at trial which exposes to the Jury the methods "potential for error."

These photographs, or a record from which they could be re-assembled, were not preserved by the Government, as such, the most significant and precious piece of evidence upon which the defendant might build and support his Motion to Suppress the in-court identification by the eye witnesses, was destroyed by the Police, the only people who were in a position to preserve it.

This Court has stated in a Line of Opinions, culminating in UNITED STATES v. KIRBY, Appeals Number 23,106; decided April 24, 1970, the importance of retaining a record of photographs used for identification in order to rebut any suggestion of suggestiveness. UNITED STATES v. HAMILTON, Appeals Number 22,361; decided July 24, 1969.

The transcript abounds with confusion to the witnesses as to the number of photographs they were shown and whether or not any had chin hair beside the defendant.

Defense counsel below, without the ability to observe and propound questions based upon the photographs used by the Police to make the initial out of court identification, must rely entirely upon the statements of the Police Officer that to the best of his recollection the photographs were selected for "skin color, general age group and as close as possible, the size" (T 47) and in addition must rely on the statements of the eye witnesses that their identification

was in no way affected by being shown the photographs in advance of Court.

Surely, the Supreme Court had more than this mere superficial inqury of the Police Officer and eye witnesses (T 31) in mind when it pronounced in SIMMONS that portion which was quoted above, specifically:

> "the danger that the use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross examination at Trial which exposes to the Jury the methods potential for error. (Emphasis added)"

The failure of the Police to preserve the photographs used or a record from which those photographs may be reassembled at the time of subsequent proceedings, makes a complete sham out of the pre-trial hearings system which has been established by the Supreme Court to inquire in to the question of impermissable suggestability. It is most unlikely to imagine that the Government would ever place upon the witness stand a lay witness who would testify that his in-court identification of a defendant was based upon photographs shown to him by the Police rather than his original recollection at the time of the commission of the crime. Recognizing the basic human characteristics no doubt prompted the United States Supreme Court in SIMMONS to make the above quoted statement that:

> "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent line up or courtroom identifieations."

The inability of the Police to produce photographs used at

the pre-trial identification by the eye witnesses coupled with the broad divergence of testimony between the two witnesses and the Police officer even as to the number of photographs used makes any inquiry by defense counsel as to the suggestability of the photographs a meaningless gesture and thus effectively deprives the defendant of the very safeguards established by the Supreme Court and a variety of lower courts.

In the case of THOMPSON v STATE; 451 P. 2d 704, the Supreme Court of Nevada in holding in a landmark opinion, discussed more substantially under Argument Number III of this Brief, required counselrepresenting the defendant to be present at the time photographs are shown to witnesses in a case in which the defendant is already in custody for the commission of the crime the investigation of which involves the exhibition of photographs to the eye witnesses.

The Court went on, however, to state as follows:

> "We would not require counsel at photographic identification proceedings while the suspect is in custody if local law enforcement authorities would but preserve competently, in the legal sense, the photographs that are displayed to witnesses, provide guide lines for proper photographic identification procedures, and follow these guidelines. If the pictures are preserved and presented in Court at subsequent proceedings with the same foundation as other similar evidence, defense counsel will be able to intelligently cross-examine the witnesses at trial..... in this case, no one was sure that the photographs, other than the Appellant's were the same photographs that were used at the pre-trial identification. The difficulties of cross-examination and the possibilities of irreparable suggestion are apparent. (Emphasis added)

The only definite testimony in this case concerning the subjects depicted in the identification photographs is the Police Officer's vague recollection both as to general size, skin color, age group and the fact that there were between ten and twenty photographs. This is hardly the degree of protection to be afforded the defendant in these cases.

II

DID THE FAILURE OF THE GOVERNMENT TO PROVIDE COUNSEL FOR THE DEFENDANT AT THE TIME THE PHOTOGRAPHS WERE SHOWN TO THE WITNESSES VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL, AT A TIME WHEN DEFENDANT WAS IN CUSTODY.

The SIMMONS case refused to go so far as denying to the Police the use of photographic identification as part of the pre-trial investigating procedures and the question with respect to the right of counsel was not raised in that case. Since SIMMONS the Supreme Court of Nevada has enunciated, in a rather enlightened and well reasoned opinion, a rule of law, which appears to be an extension of SIMMONS in conjunction with UNITED STATES v. WADE, 388 US 218; 87 S. Ct. 1926 (1967) and STOVALL v. DENNO, 388 US 293; 87 S. Ct. 1967. In the THOMPSON case, cited supra, the defendant was arrested at 3 a.m. on December 1, 1967 following a robbery of a gasoline station that midnight. At 10 a.m. the witnesses and victim to the robbery were shown photographs of the defendant and seven others about the same build. The defendant's photograph was slightly larger and had the date December 1, 1967 on it. All witnesses identified the defendant's photograph and went on to make an in-court identification. No line up was held.

The Supreme Court of Nevada went on the state language which Appellant feels is substantially related to his case. The Court stated in part:

> "We can discern no substantial difference between a lineup of photographs of persons and a lineup of persons themselves insofar as the constitutional safeguards required by WADE are concerned. The photographic display is even more subject to prejudicial distortion than is a lineup. In the former the accused is not even present to observe the condition of his identification..... both serve the same purpose in the circumstance of this case and the same protections accordingly are required."

That Court went on to hold that even though identification occurs prior to indictment, a suspect, who is in Police custody and whose identity is sought to be established from a group of pictures at the Police stationhouse, in lieu of a lineup, is entitled to have counsel present at such identification where at the time thereof prosecutorial process has shifted from the investigatory to accusatory state. In case at Bar, the defendant was taken in to the custody of the District of Columbia police for the crime for which he eventually stood trial, within one hour of the alleged robbery (T.B. 20 and T.B. 119). The arresting officer stated that the defendant was seen leaving a motor vehicle near the location of the Liquor Store and was placed under arrest as soon as he left the vehicle. (T.B. 120) Mr. Williams stated that he was shown photographs by the Police Officer, Detective Robinson, later in the evening of the robbery and that he identified the defendant's photograph as being one of those shown to him. (T. 12) The Police Officer, however, Officer Charles W. Robinson, testified that he did

not show the photographs to Mr. Williams until the Monday following the robbery. (robbery occurred on June 1, 1968 which was Saturday). (T. 42) Whichever version of the facts is to be believed, the photographs were surely shown to Mr. Williams and Mr. Pincus at a time when the defendant had been taken into custody by the police for this crime. The arresting officer, Edward L. Dory, testified at trial that the arrest of the defendant followed the receipt of a radio lookout. (T.B. 119) The evidence clearly points that from the moment the defendant was arrested, a time no greater than an hour after the incident occurred, he was entitled to the right of counsel at all stages of proceeding that followed therefrom. He was certainly entitled to have counsel present had the police elected to have a line up. UNITED STATES v. WADE, cited supra. If the defendant was entitled to counsel being present at a line up at this point in the proceedings against him, why was he not, in the language of THOMPSON, cited supra, entitled to the "Constitutional safeguard required by WADE"? Surely, the prosecutorial process had shifted from the investigatory to the accusatory state at that point in the defendant's case.

The Appellant asks this Court to establish that in his case and for all those to follow where a defendant is taken into custody in connection with a particular crime and that following his incarceration the police used photographic identification procedures on eye witnesses to that crime, that he be afforded the same protection as he would if he were taken into a line up. The usual concern of

Appellant courts about undue burden upon police investigating a crime to have counsel present during photographic showings as well as the concern that the investigation had not yet centered as to a particular defendant, and therefore which attorney would be selected or ordered to be present at the photographic showing, have no bearing on the case at bar in view of the defendant's incarceration prior to the photographic showings. If, it is as has been suggested in THOMPSON, cited supra, as well as a variety of other cases, that photographic identification is more hazardous, tenuous and subject to less credibility and more impermissable suggestability, than a line up, why is the defendant not entitled to at least the same degree of Constitutional protection that he would be in a line up, where he has already been taken into custody?

In a very recent case arising out of the U.S. Court of Appeals for the 3rd District, that Court of Appeals held in the UNITED STATES v. ZEILER, 7 Criminal law reporter, 2230 (decided June 5, 1970), that there is an absolute right to counsel at the identification by witnesses of a suspect the police already have caught. The Court distinguished that situation from the situation in SIMMONS, where the photographic identification was part of the investigatory process of tracking down any suspects at all. In the ZEILER case, three days after ZEILER'S arrest counsel was appointed to defend him. At some time later a line up was held attended by the accused counsel and some fifty persons who had witnessed the various robberies thought to have been committed by the defendant. During the course of the

trial it became apparent for the first time that after ZEILER had been taken into custody and after counsel had been appointed to defend him, but before the already scheduled line up was held, the FBI had privately confronted each witness with a series of photographs for identification. The defendant contends, relying on WADE, cited supra, that these pre-trial photographic identifications held in the absence of his appointed counsel violated his sixth Amendment Rights, or, in any event, made the witnesses in question incompetent for subsequent in-Court identifications.

The Court in ZEILER went on to state:

> "The considerations that led the Court in WADE to guarantee the right of counsel at lineups apply equally to photographic identifications conducted after the defendant is in custody. The dangers of suggestion inherent in a corporeal lineup identification are certainly as prevalent in a photographic identification..... also the defendant, himself not being present at such a photographic identification, is even less able to reconstruct at Trial what took place, unless counsel was present..... in addition, the Constitutional safeguards that WADE guaranteed for lineups may be completely nullified if the Police are able privately to confront witnesses prior to the lineup with suggestive photographs. Indeed, the present case lends support to the fear expressed by a discerning Judge that the absence of a requirement of counsel at photographic confrontations will actually encourage the Police to abuse the identification process. See UNITED STATES v. MARSON, 408 F. 2d, 644. We hold that the rule of the WADE case applied to pre-trial photographic identifications of an accused who is already in custody..... this error in itself requires reversal of both convictions. However, the question remains whether in-court identifications of ZEILER by the questioned witnesses may be admitted in to evidence on remand. In order for such in-court identifications to be admissable the Government must "establish by clear and convincing evidence" that the witnesses were not influenced by the prior improper photographic confrontations."

The Appellant in the case at Bar is again confronted with the situation where now, more than ever, it is necessary to have and examine the photographs that were used at his pre-trial photographic showing. Since the Government failed to preserve those photographs or any record from which they may be reconstructed, it is even more required that the Appellant's conviction be reversed.

It is further urged by the Appellant that this Court adopt the rule in ZEILER, cited supra, thus maintaining the overall necessity of consistency between the various Federal Circuits.

III

DID THE FAILURE OF THE POLICE TO PRESERVE THE PHOTOGRAPHS, OR A RECORD OF THE PHOTOGRAPHS, USED IN THE PRE-TRIAL IDENTIFICATION BY ALL OF THE EYE WITNESSES, AND, THE GOVERNMENTS SUBSEQUENT FAILURE TO INTRODUCE THE PHOTOGRAPHS IN EVIDENCE, CREATE A PRESUMPTION THAT THE PHOTOGRAPHS, IF THEY HAD BEEN INTRODUCED, WOULD HAVE REVEALED THAT THEY WERE UNDULY SUGGESTIVE, AND SHOULD THAT PRESUMPTION HAVE BEEN CONSIDERED BY THE COURT AND JURY.

The destruction, spoilation, or eloignment of evidence carries with it the strong presumption in law, in both Civil and Criminal cases, that if the evidence had been produced by the party who was able to produce the evidence or who spoiled the evidence or who otherwise made it unavailable, that the evidence would have been against the interests of that party. "Omnia Praesumuntur Contra Spoliatoreim" In the case at Bar, Officer Robinson, the only person in the entire world who could have preserved those photographs or a record of the photographs used during the pre-trial photographic identification by the two eye witnesses, failed to do so. Instead, the photographs were returned to the Robbery Squad and no effort was

made to preserve them or make a record of the specific photographs used.

In the case of PEOPLE v WILSON, 182 N.E. 2d, 203, (1962) the Illinois Supreme Court set aside the conviction of the defendant WILSON for the unlawful sale of narcotics where Federal Agents sent beyond the jurisdiction of the Court, an informer witness whose testimony would have been critical on the issue of the defendant's defense of entrapment. The Court held that the removal of a witness by the Government constituted a depravation of the defendant's right to a fair trial and vitiated his conviction. In the case being at Bar, the photographs had to be examined in order to determine whether there is anything which would make them unduly suggestive. The mere testimony of the Police Officers that the photographs were similar to each other, should not be enough to satisfy the Court in such a case. As it was held in PEOPLE v KIHOA, 349 P. 2d, 673, the critical question is not necessarily one of improper conduct, but rather whether the defendant's conviction resulted from some form of Trial in which his essential rights were disregarded or denied.

In the case of STATE v. WILSON, 241 P. 843 (1925 Oregon) the defendant was convicted of manslaughter of an unborn child by the use of medicine, drug or instrument or otherwise performing an unlawful abortion. At Trial it was revealed the object the State claimed to be the remains of the fetus and the scraping of the woman's uterus were not preserved and offered in evidence. The Court went on to hold that the failure of the State to introduce such a vital piece of evidence raises a presumption that such evidence would have been

adverse to the prosecution, and thus requiring the reversal and discharge of the defendant.

In the case of STATE v. OSTER, 376 P. 2d. 87 (1962 Oregon) the defendant was convicted of receiving and concealing stolen goods in Marion County, Oregon; i.e. 650 check blanks and one check printer typewriter, all the property of the Pepsi-Cola Company. Pepsi-Cola Company offices were burglarized on April 10, 1961 and the property was stolen. An accomplice testified that on the morning in question, the defendant and certain other persons, went five miles North of Salem, in Marion County, and in the presence of the defendant, burglarized the offices of Pepsi-Cola Company. The accomplice's purse was found by the Police near a log with checks in it, but the checks were not introduced in evidence. In reversing the defendant's conviction, the Court stated as follows:

> "The stolen checks were printed especially for Pepsi-Cola. They each bore the name and address of the company and a serial number. The office manager testified to the numbers of the checks that were missing after the burglary and that the checks which had been introduced in evidence (those which later had been forged and negotiated) all bore numbers of missing checks, thus if the checks found in the purse were included among those stolen, that fact would have appeared from the numbers on them. Since no explanation was given for the failure of the State to introduce them in evidence, the presumption is that they were not introduced because they would not have supported the charge."

In the case at Bar, the Government offered no explanation of why the photographs had not been preserved or some record of those photographs that were used had not been preserved and as such the Appellant contends that he is entitled to the same presumption as that which the Court applied in the OSTER case.

In the case of YOFFE v. UNITED STATES, 153 F. 2d, 570 (1946 First Circuit Case) the defendant, YOFFE et al. were charged with conspiring wilfully to attempt an evasion of income and excess profits taxes. Verdicts of guilty were returned against all concerned. The books of the corporation, through which a great deal of the fraud was allegedly worked, were not available to the Revenue investigating agents or for evidence in Court. The defendant, YOFFE, stated that the books had been ruined in a flood, and taken to a dump without his knowledge. In passing on this point, the First Circuit Court of Appeals stated:

> "Such seeming careless concern for records at a time when they were being requested by Revenue Agents would clearly support the inference that information contained therein would be harmful to the defendants."

It can certainly be stated in the Appellant's case that the Police Officer showed "seeming indifference" in his failure to preserve the photographs or a record of the photographs that were used at the pre-trial photographic showing. The Government can not be permitted to accuse and try persons of such serious crimes as the ones for which the Appellant was convicted and yet take such a careless attitude when it comes to the preservation of evidence that might be beneficial to the Appellant.

In the case of PURVIS v STATE, 63 S. W. 2d, 1030 (1933 Texas) the defendant was convicted of the offense of embezzlement. The defendant was an employee of the Tax Collector for Erath County, Texas and was convicted for his failure to pay in to the County Treasury all money shown by the records to have been collected by him as Tax

Collector. However, the evidence showed that no effort was made to check the County Depository, nor was there any evidence introduced whether or not there had ever been any thefts from the collected monies. Evidence further showed that there were three different people who had access to the cash drawer where the defendant worked and there was no other direct evidence to link the defendant to the crime. The Texas Court stated:

> "The failure of the State to explore this avenue of evidence raises the presumption that it was unfavorable to the State, especially in view of the fact that the only way they showed an embezzlement at all was to show a variance between the amounts collected by the Tax Collector and the amount that found its way into the County Treasury..... just why the deposit books were not audited seems to be shrouded in mystery, when it could have been so easily determined whether the money collected by the Collector was all deposited in the County Depository."

In the Appellant's case, it certainly remains a "mystery" why the police officer did not choose to make some record of the photographs that were shown to the witnesses after the defendant was in custody, even though the making of such a record would have required a minimum of effort. It can only be presumed that there must have been something impermissably suggestive about those photographs so as to give rise to a very substantial likelihood of irreperable misidentification.

The opinion of the Court below given at the conclusion of the testimony at the pre-trial hearing fails to take into account a presumption of suggestability. (T 83-86). Based on the above cases and testimony and as such is clearly erroneous and should be reversed.

Upon an establishment of the presumption, it was incumbent upon the Court below to place the burden upon the Government to rebut the presumption that the photographs or the manner in which they were displayed did not create a situation of impermissible suggestability.

In addition, the Court below failed to instruct the Jury on one consideration they might give to the failure of the Government to produce or preserve these photographs. (T.C. 30-46). The Court below did, however, give the following instruction concerning identification:

> "You should consider whether the identification made in open Court at this trial was in any way suggested to either witness in such a manner that the identification made in Court was not accurate beyond a reasonable doubt.....(T.C. 42-43)."

The giving of the above instruction without further instruction to the Jury as to what evaluation, weight or consideration it might give to the Governments destruction, spoilation, and failure to preserve the photographs used in the photographic show up sequence, does not sufficiently guide the Jury, especially since it was the Government that raised the subject during its closing argument thus leaving it fresh in the mind of the Jury.

> "The defense counsel talked about two photographs. Mr. Williams, according to Mr. Williams, picked out the defendant. Additionally, Mr. Pincus, who had no recollection of having seen the photographs, was noted by Officer Robinson who happened to remember, had picked out of ten or twenty photographs a picture of the defendant as a man that looked like the man that had robbed them." (TC. 18)

Even the defense Counsel below referred to the photographs in his closing argument:

> "How many of the photographs had men with goatees? Do you know how a goatee would stand out if the other photographs did not have that? You remember a guy with a goatee and then you see a photograph with a goatee" (TC 24).....Mr. Williams does not recall testifying back in July of last year that they were black and white photographs. Officer Robinson said he showed him a spread of ten photographs." (TC 25)

With this substantial reference to the photographs made by all Counsel below, as well as the Court, the Jury could reasonably be expected to have wondered how they were supposed to have treated the absence of these photographs.

It is respectfully submitted that the failure of the Trial Court to instruct the Jury in accordance with the law, which creates a presumption against that person or party which destroys or spoils evidence was clearly plain error.

IV.

THAT THIS COURT SHOULD CONSIDER THE ISSUES RAISED ON APPEAL BY THE APPELLANT NOTWITHSTANDING THE APPELLANT'S TRIAL COUNSEL'S FAILURE TO PRESERVE SAID ISSUES AT TRIAL.

While the issues presented in this appeal were not raised at the trial level and notwithstanding the general rule that Appellate Courts will review only the points raised below, Appellant believes that under the circumstances of this case, the Court should consider and determine the previous questions raised in this brief.

The primary goal of any Court is to do justice. As means or guidelines to this end, rules of procedure have been devised for the Courts to follow. As with all guidelines, a strict adherence to those rules will occasionally result in injustice. In such cases, the rules

must be abandoned, not justice. HORMEL v. HELVERING, 312 US 552, 61 S. Ct. 719 (1941)

This Court had an occasion in the HAMILTON case, cited supra, in footnote number 5, to discuss the problem of the consideration of identification questions on Appeal which were not raised at trial. In note number 5 of the HAMILTON opinion, this Court stated as follows:

> "For this reason, the Government submits that Appellant is now precluded from attacking the in-Court identification, but we think that position is untenable. It was the Government, not Appellant, that elicited the in-Court identification for the Jury. Appellant was free to combat the reliability of that identification by exploiting the potential of the photographic identification for mistake.....that he might do without waiving any legal claim that the in-Court identification was unconstitutional and improper.....it would have been the better part of wisdom to object to the in-Court identification when the Government first prepared to put it in, but in the circumstances here we do not deem the failure to object to handicap our consideration of the point. In determination of guilt or innocence, the in-Court identification was a vital item on the scale."

In the Appellant's case it was also the Government that elicited the in-Court identification for the benefit of the Jury. (Mr. Pincus, T 20 and Mr. Williams, T 79). Without the aid and assistance of this Court, defendants are helpless to pursue their own motions to suppress in-Court identifications where the police and Government have elected to deprive them of the ability to examine the photographs which played an important part in the identifications made by witnesses against them at their own trial.

CONCLUSION

1. The failure of the Police to preserve the photographs, or record of the photographs, used in the pre-trial identification by all of the eye witnesses, following the defendant's being taken in to custody for the commission of this crime, effectively denied the defendant's right to determine if the photographic identification procedure was to impermissably suggestive as to give rise to a very substantial likelihood of irreperable misidentification.

2. The failure of the Government to provide counsel for the defendant at the time the photographs were shown to the witnesses and at a time when the defendant was in custody and charged with the crime for which he was ultimately tried, violated the defendant's constitutional right to counsel.

3. The failure of the Police to preserve the photographs, or record of the photographs, used in the pre-trial identification by all of the eye witnesses, where the defendant had been taken in to custody and charged with the crime for which he was ultimately tried and convicted, and the Governments failure to introduce the photographs in evidence, created a presumption that the photographs that had been introduced would have revealed that they were unduly suggestive.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. [illegible]

UNITED STATES OF AMERICA, APPELLEE

v.

HARRY R. THOMAS, JR., APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
[illegible],
Assistant United States Attorneys.

Cr. No. [illegible]

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ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether appellant was entitled by the Sixth Amendment to have counsel present when the police investigating his offense after his arrest showed photographs to a witness?

II. Whether the fact that the photographs used in the identification process were not produced in court effectively denied appellant his opportuniy to determine whether the identification process as a whole was unduly suggestive?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,058

UNITED STATES OF AMERICA, APPELLEE

v.

HARRY R. THOMAS, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE [1]

In an indictment filed September 9, 1968, appellant and Rudolph Clemons were each charged with one count of robbery and three counts of assault with a dangerous weapon, in violation of 22 D.C. Code §§ 2901 and 502, respectively. His case came on for trial before Judge Gerhard A. Gesell on February 27, 1969. Prior to trial Judge Gesell heard testimony and argument on appellant's motion to suppress identification testimony to be given at trial. The motion was denied, and appellant was then tried before a jury on February 27, 28 and March 3, 1969. The jury found him guilty on the rob-

[1] To conform with appellant's system, appellee will refer to the transcript in this case thus: "T." for pre-trial hearing transcript, "T.B." for the trial transcript of February 27-28, and "T.C." for the trial transcript of March 3.

[2] Before testimony was given on appellants motion, Judge Gesell dismissed the indictment as to Rudolph Clemons (T. 3-4).

bery count and on two counts charging assault with a dangerous weapon.[3] He was sentenced to concurrent terms of five to fifteen years for the robbery, and three to ten years for each assault with a dangerous weapon. This appeal followed.

The Offense and Arrest

On June 1, 1968, shortly after 6:00 p.m., appellant and another man entered the Brookland Liquor Store, located at 3000 Twelfth Street, Northeast. Appellant had a pistol in his hand, and his accomplice carried a shotgun. Appellant first encountered Thurmon Williams, a customer who was on his way out of the store. He forced Williams at gunpoint back into the main business area of the store and announced a holdup. Brandishing his pistol, appellant ordered Williams and the other customers in the store, including Irwin Schindler, to lie on the floor. They complied (T. 19-38; T.B. 77-81). While his partner kept the customers at bay with his shotgun, appellant moved behind the service counter and forced the store owner, Irving Pincus, to open the cash register. With appellant pointing his pistol at him, Pincus removed $152.32 from the cash drawer. Appellant stuffed the money into his pocket and, after warning everyone in the store not to move, left the store with his partner (T.B. 19-23, 25, 32-47).

Franklin Holmes, a resident of the neighborhood who was parking his car a short distance from the store, saw appellant and his partner rush out of an alley leading from the store toward a gold Pontiac sedan parked behind him. His suspicion was aroused when both men yelled "Let's go" to the driver who had been waiting in the car and put something into the trunk before jumping into the car. He was able to take down the license number and a description of the car before it sped off (T.B. 102-116).

[3] The third count, changing assault with a dangerous weapon upon Irwin Schindler, had been dismissed by Judge Gesell before the case was submitted to the jury (T.C. 4-5).

This information and the victims' descriptions of appellant and his accomplice provided the basis for a police lookout for the car and its occupants which was broadcast about 7:00 p.m. Detective Edward Dory of the Metropolitan Police heard the lookout while he was cruising near Seventeenth Street and Independence Avenue, Southeast. Moments later he spotted the car with three occupants as it turned onto Massachusetts Avenue from Seventeenth Street. He and his partner, Detective Rhone, pursued the car and stopped it near Sixteenth Street and Indpendence Avenue, Southeast. Appellant alighted from the car and started to flee but was apprehended by Detective Rhone after a few steps. The car sped off (T.B. 119-144).

The defense was alibi. Appellant placed himself in a crap game in an alley behind the 1600 block of Independence Avenue, Southeast, from 1:30 p.m. until "after" 6:00 p.m. (T.B. 162-163). At about 6:45 p.m. he quit the game and gave $3.00 to one of the players—whose name he could not recall—to drive him from the site of the crap game to a restaurant near Fifteenth Street and Independence Avenue, a distance of two blocks. The man drove him in his tan Pontiac from the alley to the location of the restaurant, where he was apprehended by Detective Rhone as he got out of the car (T.B. 162-177).

The Photographic Identification

Thurmon Williams testified that later in the evening of the offense Detective Charles Robinson of the Metropolitan Police came to his home with several photographs. He handed him four color photographs and merely asked if he could identify anyone. He did not say that a photograph of the robber was among them, or that any of the pictures depicted appellant. He did nothing to point out any photograph to Mr. Williams. Each photograph was a front view of a different Negro male. Mr. Williams compared them and picked out appellant's photograph. Appellant's picture showed him wearing a goatee, but Mr. Williams was unable to recall whether the other

photographs depicted men with hair on their faces (T. 11-13, 24-30, 83; T.B. 88-89).

Detective Robinson recollected that he had shown photographs to Mr. Williams on June 3, 1968, the date on which appellant had been brought before the United States Commissioner (T. 42, 50-51). The detective selected from ten to twenty Polaroid color photographs from the Robbery Squad files, all of them similar in terms of race, age group, skin color, size and general features (T. 47-48, 62, 67). Among them was a single picture of appellant. In this picture, taken on June 1 shortly after he was apprehended, appellant had "hair on his face" (T. 63). Detective Robinson was unable to recall whether the other men pictured had hair on their faces (T. 63, 66). He presented this group of photographs to Mr. Williams in a stack and asked him if he recognized anyone. He did not tell him that anyone had been apprehended (T. 43, 66). He was unable to recall whether Mr. Williams picked out appellant's picture (T. 43; T.B. 182).[4] After Williams viewed the selection of photographs the detective replaced them in the Robbery Squad files, and because he had made no record of them he was unable to retrive them for use at trial (T. 47).

ARGUMENT

I. The Sixth Amendment does not require the presence of counsel at a post-arrest photographic identification.

(T. 12-15, 23-32, 37-38, 42-51, 60-67, 77-78, 81-83; T.B. 41-42, 88-92, 179-190)

Appellant claims that the rule of *United States* v. *Wade*, 388 U.S. 218 (1967), should be extended to re-

[4] Detective Robinson also testified that he had shown the same photographs to Mr. Pincus earlier on June 3. Pincus was unable to identify appellant positively from the photographs, but he indicated that appellant's photograph "looked like" the robber (T. 47; T.B. 186-187). At the time of the trial Pincus himself was unable to recall whether he was shown any photographs at all (T. 81; T.B. 41).

quire that counsel be present at post-arrest photographic identification proceedings, even though the suspect himself is not present. This contention is without merit.

The federal courts have consistently refused to apply *Wade* to photographic identifications. Since *Simmons* v. *United States*, 390 U.S. 377 (1968), the only post-*Wade* case in which the Supreme Court has dealt with photographic identifications, no circuit has affirmatively held that *Wade* applies to photographic identifications. The Second, Fourth, Fifth, Ninth and Tenth circuits have explicitly and unequivocally determined that counsel is not required at a photographic identification.[5] Moreover, this Court has implicitly held that *Wade* does not apply to photographic identifications which take place even after arrest.[6]

Contrary to appellant's view, *Wade* clearly did not lay down a blanket rule prohibiting all types of identifica-

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[5] *United States* v. *Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1970); *United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969); *United States* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970); *United States* v. *Sartain*, 422 F.2d 387 (9th Cir. 1970); *Rech* v. *United States*, 410 F.2d 1131 (10th Cir. 1969). The law on this point in the Third Circuit is unsettled. *Compare United States* v. *Conway*, 415 F.2d 158 (3d Cir. 1969), *with United States* v. *Zeiler*, 3d Cir. No. 17,817, decided June 5, 1970. The two courts which have held that the *per se* rule of *Wade* and *Gilbert* v. *California*, 388 U.S. 263 (1967), applies to photographic identifications have done so in situations where the police were attempting to circumvent *Wade-Gilbert*. In both *United States* v. *Zeiler*, *supra*, and *Commonwealth* v. *Whiting*, Pa. Sup. Ct. No. 213, decided July 2, 1970, the police showed photographs to witnesses in an obvious attempt to prepare them for a subsequent lineup identification. We do not consider Nevada as having adopted the *per se* rule for which appellant apparently contends here. *Compare Thompson* v. *State*, —— Nev. ——, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969); *with Carmichael* v. *State*, —— Nev. ——, 467 P.2d 108 (1970); and see this Court's comment in *United States* v. *Kirby*, —— U.S. App. D.C. ——, ——, 427 F.2d 610, 612-613 (1970).

[6] *United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969), in which the briefs show that the photographic identification took place after the defendant was arrested. *See United States* v. *Kirby*, *supra* note 5, —— U.S. App. D.C. at —— and n.2, 427 F.2d at 612 and n.2.

tions made in the absence of counsel. Instead the Supreme Court recognized that the means of pretrial identification vary so much in type and circumstance that its duty in evaluating them for the purpose of requiring the presence of counsel demanded an analysis of "whether potential substantial prejudice to defendants' rights inheres *in the particular confrontation* and the ability of counsel to help avoid the prejudice." 388 U.S. at 227 (emphasis added). Obviously, therefore, not all confrontations are "critical" for *Wade* purposes. This Court has directly acknowledged this fact as to uncounseled on-the-scene identifications, *Russell* v. *United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280, *cert. denied*, 395 U.S. 928 (1969), and appellee submits that the same result should hold for the identification in appellant's case. In *Wade* the Supreme Court held that counsel was required at a lineup for three reasons: so that the accused would not have to "stand alone," [7] to prevent unfairness,[8] and to enable the defendant to reconstruct what occurred at that proceeding in order to defend himself properly at trial.[9] We think that in the case of a photographic identification none of these considerations has force sufficient to require a *per se* rule that counsel must be present when photographs are viewed by a witness. Appellant was not confronted by or forced to "stand alone" before anyone. He was not present, of course, when Thurmon Williams examined the photographs, and if Detective Robinson's recollection was correct that he showed the pictures to Williams on Monday, June 3, he was not even in custody.[10] Neither *Wade* nor any other Supreme Court decision even suggests that a defendant's right to counsel requires that his lawyer be present in

[7] 388 U.S. at 226.

[8] *Id.* at 235-236.

[9] *Id.* at 230-232.

[10] The Commissioner's Record of Proceedings indicates that appellant was presented at 2:00 p.m. on June 3 and released on bond the same day.

situations in which the defendant himself is not a participant.[11] As for the danger of unfairness and reconstruction of the identification process, we submit that appellant's due process rights were adequately protected by his right of cross-examination. As *Simmons* stated:

> The danger that the use of the [photographic identification] technique may result in convictions or misidentifications may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. 390 U.S. at 384.

Unfairness in a photographic identification stems from two general sources: the nature of the photographs themselves and the conduct of the police displaying them as it affects the viewer. Since, to our knowledge, no decision has held that counsel is entitled to question witnesses at any type of out-of-court identification proceeding, and such witnesses in any event are not under oath, the only practical way to determine the effect of the conduct of the police on the viewer is in court, where counsel and the judge can play their accustomed roles.[12] In appellant's case, the Government produced all the individuals who could possibly shed any light on the photographic identification: Thurmon Williams, Irving Pincus and Detective Robinson. Review of the cross-examination of all three at the hearing and at trial—as well as the direct examination—reveals that both of the possible sources of prejudice were fully explored (see T. 12-15, 23-32, 37-38, 42-51, 60-67, 77-78, 82-83; T.B. 41-42, 88-92, 179-190). Admittedly, less extensive questioning would have been necessary if counsel representing appel-

[11] *See United States* v. *Bennett*, *supra* note 5, 409 F.2d at 899.

[12] The logic permitting defense counsel to attend a photographic identification would surely permit, if not require, that a prosecutor be present as well. Unless a neutral officiating party were also present—to make "findings of fact"—both counsel might well be put in the awkward position of subsequently having to testify in court regarding the circumstances of the identification. *Cf. United States* v. *Vereen*, D.C. Cir. No. 23,173, decided May 13, 1970.

lant had somehow been present at the photographic identification or if the photographs themselves had been retrieved for use in court; but neither procedure is required by the decided cases, and in our view appellant's identification received a full review in the proper forum, the courtroom.

II. The failure to produce in court the photographs used in appellant's identification did not effectively limit his opportunity to attack the identification procedure.

We find no merit in appellant's argument that the mere failure of the police to produce the photographs used in the identification, or to preserve a record of them, effectively denied him of the opportunity to determine whether the photographic identification procedure was unduly suggestive. Though we acknowledge that it would have been preferable in terms of efficiency for the photographs to have been available, we cannot perceive how it follows from their absence alone that appellant's challenge to the entire identification process was unduly hindered.

Neither the Supreme Court nor this Court has ever laid down an absolute requirement that the prosecution make available photographs used in an identification. In *Simmons* the Supreme Court found no due process violation in the exhibiting of photographs to witnesses by FBI agents even though the photographs themselves were apparently never produced at the trial. The Court merely noted that it would "have been preferable for the Government to have labeled the pictures shown to each witness and kept them available for trial." 390 U.S. at 388. Similarly, in neither *United States* v. *Hamilton*, *supra* note 6, nor *United States* v. *Kirby*, *supra* note 5—the only two decisions in this Circuit which deal with the preservation of identification photographs—did this Court state as an affirmative requirement that photographs shown to witnesses must be preserved. Both decisions merely express the desirability of this practice and do not disturb the obvious inference that nonsug-

gestibility may be demonstrated from the testimony of the principals involved in the viewing of the photographs without a review of the photographs as well.

Turning to appellant's case, we note first that, as *Simmons* commands, "each case must be considered on its own facts." 390 U.S. at 384. The totality of the evidence in this case shows clearly that appellant suffered no prejudice. Though the photographs were not available, all the pertinent witnesses were, and as we have already pointed out, both counsel and the Court brought out the minutiae of the identification sequence. These included the facts, agreed to by both Thurmon Williams and Detective Robinson, that only one photograph of appellant was among those shown, that the detective did nothing to indicate which photograph should be picked, and that he did not even announce that the robbers had been apprehended. The detective testified that he selected the group of photographs he brought to Williams on the basis of similarity of race, age group, skin color, size, and general features. Williams said nothing to contradict this. And as we have noted, the equally important factor of the effect of police conduct of the identification on the viewer himself was fully explored in the examination of Thurmon Williams, and the presence or absence of the photographs in court could have no effect on the outcome of this aspect of the inquiry into suggestivity. *See United States* v. *Williams*, —— U.S. App. D.C. ——, 421 F.2d 1166 (1970).

In passing we also note the reasonableness of the police department's failure to preserve the photographs or a record of them for later use at trial in light of the lack of judicial scrutiny which this aspect of police procedures had received prior to the date of the offense in this case. The robbery occurred on June 1, 1968. It cannot be fairly said that at that time any court had put the police on notice that preservation of photographs used at an identification even might be required. *Simmons*, decided on March 18, 1968, had merely noted that preservation of the photographs would have been "pref-

erable." The first occasion on which this Court spoke on the subject of taking and preserving *lineup* photographs was in *Patton* v. *United States*, 131 U.S. App. D.C. 197, 403 F.2d 923, which was decided October 29, 1968. And not until July 29, 1969, in *United States* v. *Hamilton*, *supra*, did this Court first indicate that it would be good police practice to preserve *identification* photographs. We submit, therefore, that the police can hardly be held to have been on notice at the time appellant committed the offenses in this case that the photographs used during their investigation should have been preserved or recorded and made retrievable.

Appellant also argues for the establishment of a rule that the absence of the photographs created a presumption that they were unduly suggestive under the *Simmons* standard. Manifestly no such "presumption" is permissible under the controlling rules of evidence. As this Court has quite recently reaffirmed, a valid judicial presumption must contain a rational connection between fact proven and the ultimate, assumed fact. *United States* v. *(Alphonso) Johnson*, D.C. Cir. No. 22,311, decided September 4, 1970, slip op. at 14-15; *cf. Leary* v. *United States*, 395 U.S. 6 (1969); *United States* v. *Gainey*, 380 U.S. 63 (1965); *Tot* v. *United States*, 319 U.S. 463 (1943). See also McCORMICK, EVIDENCE § 309 (1954). Certainly the "proven fact" that the photographs were not produced at the hearing or at trial cannot rationally support the inference that the photographs themselves—standing alone without any manipulation by the police before the eyes of the identifying witness—are not only suggestive in some way, but so suggestive as to violate the *Simmons* standard. *See* 390 U.S. at 384. Further, we are hard put to appreciate how something as subjective as suggestivity (of any sort) can be a "fact" capable of being inferred from any proven fact, let alone a negative "fact" of mere absence.[13]

[13] In this regard we point out that the six cases appellant cites at pp. 16-19 of his brief are both factually and legally distinguish-

Finally, appellant's "presumption" is unreasonable also in the effect it would have on the procedure to be followed by a court in ruling on a motion to suppress. In a word, it would make it meaningless. Armed with this "presumption," a defendant in a *Simmons* hearing, who has the burden of persuasion as well as the burden of going forward, would merely have to produce testimony that the photographs used in the identification were not available for use in court, and he would prevail in virtually every case, since the Government obviously would not be able to "rebut" the presumption because the photographs were not separated from the police files or recorded. Surely the *Simmons* standard of suggestivity requires more evidence than this to show a denial of due process. In fact, because a defendant has both the burden of going forward and the burden of persuasion, the format of a *Simmons* suppression hearing may fairly be viewed as in effect erecting a presumption of non-suggestivity which the defendant must overcome with his evidence. Furthermore, even if appellant's "presumption" were applicable *at trial*, the failure of his trial counsel to request an instruction based upon it precludes him litigating the issue now. *See* FED. R. CRIM. P. 30. And, as the foregoing discussion has shown, there is no legal basis for such a "presumption", so that appellant is foreclosed from relying on the plain error rule[14] to

able from this case and the "presumption" for which he is arguing here. In each evidence was kept from the trial by a *willful* or *reckless* act of the prosecution or a litigant, and it was a fair presumption from such conduct in the circumstances of those cases that the evidence suppressed was in fact unfavorable to the malefactor. Here, on the other hand, there is no evidence that the police acted either willfully or recklessly in not producing the photographs, especially in the absence of any clear-cut indication from the courts at the time of the offense and viewings that the photographs should be preserved or recorded for future use. Thus the most appellant was entitled to was the natural inference the trier of fact might draw from the absence of this evidence. *See (Barrington) Johnson* v. *United States*, —— U.S. App. D.C. ——, ——, 426 F.2d 651, 656 (1970) (*en banc*).

[14] FED. R. CRIM. P. 52.

circumvent his failure to raise the issue at the time instructions were given in the trial court.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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